

was supposedly precluded from constructing as a result of any order he had issued. Tr. 852-855. Similarly, Howard Conant, an individual on whom RBC was supposedly (see Paragraphs 60-102, infra) relying for financing, testified in the instant hearing that Mr. Rey had never told Mr. Conant that the Miami Tower Litigation prevented RBC from going forward. Tr. 701.

41. There is no evidence to support the notion that RBC in fact felt itself prohibited from constructing by Judge Marcus' order. There is, however, direct evidence to the contrary, i.e., evidence demonstrating that RBC did not feel itself constrained in that regard. Mr. Rey was shown a transcript (Press Exh. 17) of sworn deposition testimony he gave in the Miami Tower Litigation on December 18, 1990 -- three weeks after the November 27, 1990 prehearing status conference. Tr. 846. In his testimony in the instant hearing, Mr. Rey confirmed that, in his deposition in the Miami Tower Litigation, the following exchange occurred:

Q: Is it your understanding as you sit there right now if you want to put the antenna up top that you can put it up at that height on the tower?

Rey: I could put it up at that height but I have to share it is what they are telling me.

Id. Mr. Rey confirmed that that particular deposition testimony was truthful. Tr. 856.

42. Mr. Rey also was unable to point to any document in which RBC advised the Commission that RBC was prevented from constructing its station because of any order of Judge Marcus, Tr. 823-829. Mr. Rey specifically acknowledged that he could

find no such reference in RBC's July 2, 1993 petition for reconsideration (Rainbow Exh. 8), which was addressed to Ms. Kreisman's June 18, 1993 letter. Tr. 826. Counsel for RBL ultimately stipulated that no document filed with the Commission by RBC had ever referred to the prehearing status conference or Judge Marcus' order issued in connection with that conference, Tr. 829-830.

43. The lack of any such reference is noteworthy because Ms. Kreisman's stated basis for denying RBC's June, 1991 extension application was her conclusion that "[RBC] clearly chose not to begin construction, and . . . the dispute with Gannett was not over whether [RBC] could construct but rather over whether it could prevent a competitor from utilizing its site." Jt. Exh. 8, p. 3. Since that decision was based on the determination that RBC's failure to construct was voluntary, RBC would normally have been expected, in its petition for reconsideration of Ms. Kreisman's decision, to attempt to demonstrate that the failure to construct was not voluntary (if that had, in fact, been the case). But, as noted, RBC's July, 1993 petition for reconsideration of Ms. Kreisman's decision contains no reference at all to any order of Judge Marcus which might have prevented (whether actually, or merely in RBC's opinion) RBC from constructing. Tr. 826; Rainbow Exh. 8. <sup>17/</sup>

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<sup>17/</sup> RBC failed to present -- in either of its extension applications or in any pleading, including its July, 1993 petition for reconsideration -- any showing that the Miami Tower Litigation (including, in particular, any order of Judge Marcus) (continued...)

B. The Alleged Inability and/or Unwillingness of Gannett to Cooperate in Construction

44. In attempting to explain RBC's failure to construct its station between August, 1990 and June, 1991, Mr. Rey also suggested that, during the Miami Tower Litigation, Gannett was prohibited from undertaking any construction and was not, in any event, communicating with RBC. E.g., Tr. 735, 804, 857, 858, 862.

45. The available documentary evidence does not support the notion that Gannett was prohibited from allowing RBC to construct. As noted above, Judge Marcus' orders (Rainbow Exh. 5, Press Exh. 14) and the transcript of the prehearing status conference in the Miami Tower Litigation (Press Exh. 16) indicate that the "status quo" order issued in connection with the November, 1990 prehearing status conference was limited to

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<sup>17/</sup>(...continued)  
precluded RBC from constructing. As a result, RBC is technically foreclosed from advancing such a showing at this late date. An applicant is required to "make a specific and detailed showing in order to justify an extension" of a construction permit. Carolyn S. Hagedorn, 11 FCC Rcd 1695, 1696, ¶12 (1996). Post-application supplementation is not generally permitted or considered, since "an applicant must either take the initiative to present its case fully and completely at the outset, or bear fully the risk that its showing will be found inadequate." Id. See also Deltaville Communications, FCC 96-343, released September 12, 1996. RBC's reliance -- advanced only now, in 1996 -- on some supposed order of Judge Marcus which predated RBC's January, 1991 application is clearly too late by years.

While complete rejection of that factual claim is thus technically warranted, RBC's showing is so obviously baseless that, whether it is summarily rejected or considered and then rejected, the result is the same: RBC's claims concerning Judge Marcus' order are plainly disproved by the available, contemporaneous, documentary evidence, and RBC's claims must therefore be rejected.

Gannett's relationship with Press. In supposed support of Mr. Rey's testimony concerning Gannett's supposed inability to construct, RBC offered a letter, dated March 27, 1991, from a Gannett official to a Press official. See Tr. 736, referring to Rainbow Exh. 7, p. 17. But that letter -- which was written to Press, not RBC -- merely indicates that Gannett's view paralleled what Judge Marcus' orders (and the status conference transcript) state on their face: that the only limitation imposed on Gannett was with respect to its relationship with Press. <sup>18/</sup>

46. Notwithstanding this, Mr. Rey testified that he believed that Gannett was unwilling or unable to construct a transmitter building, which was (according to Mr. Rey) the necessary first step to construction of RBC's station. Tr. 733-735, 833, 856-858. The basis for this testimony seems to be Mr. Rey's apparent assumption that any transmitter building which might have been built by Gannett would by necessity have had to include Press as a tenant at the 1500-foot level of the tower; as a result -- according to Mr. Rey's apparent view of the matter -- any such construction would have entailed some change in the status quo in violation of Judge Marcus' order. E.g., Tr. 858.

47. Other than Mr. Rey's testimony, RBC offered no documentary evidence (and no testimonial evidence from, e.g., any Gannett official) in support of the notion that Gannett believed itself to be precluded from constructing a transmitter building

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<sup>18/</sup> The letter reads, in relevant part, that "if [Gannett] proceeds in any way with Press, . . . we will be in violation of a court order". Rainbow Exh. 7, p. 17 (emphasis added).

during the period November, 1990 - June, 1991. And the evidence which was adduced at hearing contradicts Mr. Rey's asserted belief.

48. The transmitter building about which Mr. Rey testified was a matter which had been under discussion between RBC and Gannett since at least August, 1990. Rainbow Exh. 7, p. 19; Tr. 860. According to Mr. Rey, Gannett intended to build a building capable of housing transmitter facilities for three broadcast tenants on the tower -- an FM station and two television stations, one of which would be RBC's station. Tr. 857; Rainbow Exh. 7, p. 19. Mr. Rey testified repeatedly that there were at least two separate "slots" on the tower available for television antennas -- one at 1500 feet (which was the slot at issue in the Miami Tower Litigation), one at 1400 feet. E.g., Tr. 765. Mr. Rey's understanding concerning Gannett's supposed inability or unwillingness to construct a transmitter building prior to June, 1991 supposedly arose from his apparent assumption that the third tenant of the building (in addition to RBC and the FM tenant) would have to be Press, operating from the contested 1500-foot slot. Tr. 857-858.

49. But there is no evidence at all supporting Mr. Rey's threshold assumption. Indeed, as noted, the available evidence contradicts Mr. Rey's belief. First, in a July 23, 1991 letter to James Baker (an officer of Gannett), Mr. Rey indicated that, as of August, 1990, Mr. Rey understood that the transmitter building would house "both television tenants and a new FM

tenant". Rainbow Exh. 7, p. 19. In other words, Mr. Rey understood, from August, 1990, that the transmitter building could be built for use by any two "television tenants", without apparent regard for their particular identity or the particular position on the tower which either might occupy. Since Mr. Rey testified that RBC was not preventing Gannett from leasing space to anyone (including Press) in the 1400-foot slot, Tr. 766, it is clear that, even if RBC had ultimately prevailed in the Miami Tower Litigation (which it did not), a transmitter building with space for three broadcast facilities could and would have been useful. Thus, Gannett could have constructed the building without regard to the pendency of the Miami Tower Litigation, as the building could have been used even if RBC had prevailed in the Miami Tower Litigation.

50. This is further confirmed in Mr. Rey's July 23, 1991 letter (Rainbow Exh. 7, p. 19) to Mr. Baker. There, Mr. Rey specifically acknowledged that RBC wished to pursue one of a number of alternative construction approaches outlined in Mr. Baker's July 17, 1991 letter (Press Exh. 7) to Mr. Rey. But the other approaches outlined in Mr. Baker's letter -- the approaches which RBC rejected -- make it clear that construction of the transmitter building was not at all dependent on simultaneous participation by all three tenants. See Press Exh. 7, 2-3. To the contrary, Mr. Baker's letter indicates that the transmitter building could have been built in a number of configurations which would have permitted RBC -- or Press -- to

be included in or excluded from the construction process. Id. Thus, even if Gannett did think that it was precluded from building a transmitter building in which Press might someday be a tenant -- and there is no evidence of any such belief on Gannett's part at all -- nothing would have precluded Gannett and RBC from constructing a building to be used only by RBC (or perhaps RBC and an FM tenant).

51. Also contradicting Mr. Rey's testimony concerning his belief that Gannett could not and would not build the transmitter building from November, 1990 to June, 1991 is the statement in Mr. Baker's letter that, during the "last seven months" preceding July 17, 1991 -- i.e., from approximately December, 1990 to July 17, 1991, the precise time period during which Mr. Rey asserts Gannett was unable and unwilling to construct -- Gannett had "been moving forward with the permitting process for [the transmitter] building addition and negotiations with the contractor for the construction of the building shell." Press Exh. 7, pp. 1-2. Mr. Rey was unable to confirm the accuracy of Mr. Baker's statement concerning Gannett's construction-related efforts during the period December, 1990-July, 1991 because "I never asked them. There was no reason to ask them." Tr. 872.

52. In other words, Mr. Rey made no effort to determine the status of Gannett's construction efforts during this crucial period. Mr. Rey's self-serving conclusion that Gannett was unwilling and/or unable to proceed with construction of the transmitter building from November, 1990-June, 1991 is thus

without foundation in view of Mr. Rey's own admission that he himself elected not to communicate with Gannett about that topic during that time period and thus had no way at all of knowing whether Gannett would or would not cooperate with RBC.

53. Mr. Rey attempted in his testimony to suggest that the lack of communication between RBC and Gannett was Gannett's fault. E.g., Tr. 839 ("So the landlord is not talking to me"); 857 ("[T]hey [i.e., Gannett] were not talking to me"). But, confronted with Mr. Baker's letter (Press Exh. 7), Mr. Rey admitted that the lack of communication was attributable to RBC's own private choice. Tr. 868-869. In his letter (Press Exh. 7), Mr. Baker referred to an inquiry sent to RBC by John De Mateo, a Gannett official, in November, 1990, seeking certain information to permit Gannett to proceed with construction. Mr. Rey acknowledged receiving that November, 1990 letter, and also acknowledged that RBC had chosen simply not to respond to it. According to Mr. Rey:

Rey: . . . I do recall getting a letter from John De Mateo, and I do recall the essence of that letter, wanting information regarding Exhibits B and C, and that we could not provide that as a matter of legal defense, if you will, legal positioning. . . .

Q: But is it correct that there was an outstanding request for information presented to [RBC] by Gannett in November of 1990 which [RBC] elected not to respond to?

Rey: If you characterize a pending request as a bait to a litigation that answering that letter would have made the Plaintiff's position in the litigation obsolete, if you will, I guess so. But I was instructed by lawyers at the time very clearly that it was a baited letter, and that we could not give him the information that they so-called requested so we can participate in the three-room scenario.



Tr. 869.

54. This testimony completely undermines Mr. Rey's claim that Gannett would not communicate with RBC. To the contrary, by Mr. Rey's own admission, it was RBC which chose, as a matter of "legal positioning", Tr. 869, not to communicate with Gannett from November, 1990 to June, 1991.

C. The Actual Reason for RBC's Failure to Construct Its Station

55. Contrary to Mr. Rey's claims concerning RBC's supposed inability to construct, the record (as demonstrated above) establishes that, from August, 1990 through June, 1991, RBC was not precluded from constructing either by any order from Judge Marcus or by any lack of cooperation by Gannett. Nor, for that matter, was construction precluded, or delayed, by the dispute which RBC had concocted against Gannett (and which formed the basis of the Miami Tower Litigation). Rather, RBC's failure to construct during that time period was solely attributable to RBC's own decision not to construct.

56. Mr. Rey repeatedly testified that, from November, 1990 through June, 1991, he believed that, because of competitive, economic considerations, RBC's permit -- and any station which might be built pursuant to that permit -- would be "worthless" if that station were to be the sixth television station in the Orlando market. E.g., Tr. 780-81, 790, 872, 888, 916, 989. RBC's Complaint initiating the Miami Tower Litigation plainly reflects Mr. Rey's belief in the likely "worthlessness" of the

permit at that time. Press Exh. 9 at, e.g., pp. 12-14. <sup>19/</sup>

57. Thus, as of November, 1990, RBC faced the prospect that its permit was "worthless". In light of that prospect, RBC elected not to construct its station. Instead, it pursued its litigation against Gannett (and Press), and sought extension of its construction permit based on the Miami Tower Litigation. The clear voluntariness of RBC's decision not to construct was underscored by Mr. Rey:

Q: Is it true that if [RBC] had dismissed [the Miami Tower Litigation] you could have proceeded with construction?

Rey: Yes, that's true, and it could have been [a] worthless CP, and I would have chosen maybe to give it back to the FCC or something like that at that time. In November or December of 1990, that's what I believed.

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<sup>19/</sup> RBC's Complaint demonstrates that RBC believed that Press's Channel 18 operation, if allowed to go forward, would be the fifth station in the market, thus making RBC's station (if it were ever to commence operation) the sixth station, at best. Press Exh. 9. For that reason, RBC initiated the Miami Tower Litigation, i.e., to attempt to prevent Press from becoming the fifth station in the market. Id.; Tr. 765-66, 776-82. Simultaneously, RBC was also seeking the same result by challenging -- first at the Commission, then at the Court of Appeals -- the channel "swap" decision which authorized Press' relocation to Channel 18 at the Gannett site. See, e.g., Rainbow Broadcasting Company v. FCC, 949 F.2d 405 (D.C. Cir. 1991).

Since 1994, RBC and Press have operated their respective stations from the same height on the Gannett tower. Tr. 974-75. And, in the Channel 18 "swap" proceeding the Commission had specifically rejected the claim that such co-located operations might cause objectionable interference. Swap Report and Order at ¶19. Accordingly, it may be concluded that RBC's multi-faceted efforts to prevent Press from relocating Channel 18 to the Gannett tower were motivated strictly by RBC's own private, competitive, business interests.

Tr. 888. <sup>20/</sup> Mr. Rey further underscored this voluntariness when he testified that RBC's decision ultimately to go forward was motivated not at all by resolution of the Miami Tower Litigation, but rather by Mr. Rey's perception that, by mid-1991, the economic prospects for a sixth station in the market had improved substantially. Tr. 989-992.

58. Finally, even if all of Mr. Rey's various claims were credited and it were determined that the Miami Tower Litigation had somehow delayed construction (and again, the evidence indicates that that was not the case), RBC could itself have eliminated that impediment: RBC could simply have dismissed that litigation, since RBC had initiated it. But RBC chose not to terminate its litigation because its station would then have been "worthless". E.g., Tr. 888.

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<sup>20/</sup> See also Tr. 872, where Mr. Rey was questioned about Mr. Baker's assertion that Gannett understood that RBC "would not build [its] television station if [Press] was allowed on the tower" (Press Exh. 7). Mr. Rey responded

. . . [It] was my belie[f] at the time of the [Miami Tower L]itigation in December of 1990, January of 1991, that it would have been worthless for Press to have been the fifth station and we would have been the sixth station. That's what I think this is referring to.

And until recently, the litigation ended, and we decided to go forward. Things had changed, some had not, but we were willing to go forward.

Tr. 872. Far from denying the thrust of Mr. Baker's statement -- i.e., that RBC, for its own private, competitive reasons, had chosen not to construct -- Mr. Rey's testimony confirms that he believed RBC's station to be worthless in December, 1990 and January, 1991, but by June, 1991 (when the preliminary injunction litigation had been resolved) "things had changed" and RBC "decided" to go forward.

59. It is incontestable on this record that RBC's failure to construct during the period August, 1990 through June, 1991 was a voluntary decision by RBC solely attributable to Mr. Rey's concern about the value, or lack of value, of RBC's station in light of the competitive environment (an environment influenced by Press' presence as the "fifth station" in the market). The evidence demonstrates that, during the period August, 1990-June, 1991, construction of RBC's station was not delayed by pendency of Miami Tower Litigation or the dispute underlying that litigation.

III. Issue Concerning Misrepresentation/Lack of Candor  
Relative to RBC's Financial Qualifications

60. In its original construction permit application, RBC certified that it was financially qualified to construct and initially operate its station. Tr. 760. In each of the extension/reinstatement applications filed by RBC between 1988 and August, 1990, RBC answered "yes" in response to the question of whether "the representations contained in the application for construction permit are still true and correct." Tr. 762. Thus, up to August, 1990, RBC had continuously represented to the Commission that RBC was financially qualified.

61. In its Complaint initiating the Miami Tower Litigation in November, 1990, RBC stated that, if Press were allowed to install its antenna at the 1500-foot level of the Gannett tower:

[RBC] will be unable to secure financing to build and operate the station. . . .

[RBC]'s ability to compete in the Orlando television

market will be obstructed to the point that it will not be able to secure the financing to build a television station for Channel 65 or any other tower in the area. . . .

No financing will be available to build and operate [RBC's] station, given that it is not economically viable, and the station will never be built.

Press Exh. 9, pp. 12-14.

62. Based on the evidence offered by RBC in the Miami Tower Litigation, Judge Marcus found, inter alia, that RBC had no financing at all. 766 F. Supp. at 1145.

63. Nevertheless, in its January, 1991 and June, 1991 extension applications, RBC again answered in the affirmative in response to the question of whether "the representations contained in the application for construction permit are still true and correct." Jt. Exhs. 2 and 3. Thus, RBC represented to the Commission, in its January, 1991 and June, 1991 extension applications, that RBC remained financially qualified. RBC further held itself out as so qualified in its January, 1991 extension application when it specifically and expressly represented to the Commission that RBC was "ready, willing and able" to construct. Jt. Exh. 2, p. 3. RBC's June, 1991 extension application similarly advanced that notion by specifically and unconditionally representing that RBC was proceeding with construction and would commence operation prior to December 31, 1992. Jt. Exh. 3, p. 2.

64. Because of the obvious inconsistency in the positions taken by RBC before Judge Marcus, on the one hand, and the Commission, on the other, the Court of Appeals (and, on remand,

the Commission in the HDO) concluded that a substantial and material question of fact existed as to whether RBC had committed misrepresentation with respect to its financial qualifications. Press Broadcasting Company, Inc. v. FCC, supra.

65. At hearing, RBC proffered only the testimony of Mr. Rey and Mr. Conant, as well as a written statement by Mr. Conant. As discussed below, RBC attempted to prove that, at all times relevant to this case, RBC had available to it an oral commitment, from Mr. Conant, to provide financing for construction and initial operation. However, the evidence in fact raises serious questions as to the actual existence of any such commitment. And even if such a commitment were found to have existed at some time, the evidence unquestionably establishes both that financing from Mr. Conant was not available to RBC during the period November, 1990-June, 1991 and that RBC was aware of (indeed, it was responsible for) that non-availability.

A. The Existence of the Conant Commitment

66. The testimony of both Mr. Conant and Mr. Rey at hearing was well-coordinated with respect to the genesis and terms of the supposed Conant financing commitment. According to their testimony in June, 1996, Mr. Rey and Mr. Conant reached an agreement sometime in mid-1984 (or possibly 1985) pursuant to which Mr. Conant agreed to provide RBC financing. Tr. 749; 655. According to their testimony, the terms of the supposed agreement were relatively elaborate. Mr. Conant was to provide up to

\$4 million, in return for which he was to receive:

- (a) repayment over a five-year period, in equal monthly installments, at 2 percent over prime;
- (b) 50 percent of the station's net cash flow for five years;
- (c) 25 percent of the station's net cash flow for every year after the first five years of operation;
- (d) 10 percent of the net sale price if the station were to be sold <sup>21/</sup>;
- (e) a security interest in the station's assets, subject only to any prior interest that might be held by an equipment supplier;
- (f) the personal guarantees of Mr. Rey and Leticia Jaramillo, another principal of RBC.

Rainbow Exh. 4, p. 2; Tr. 693-694; 751-752. The Conant commitment was never reduced to writing. Rainbow Exh. 4, p. 1; Tr. 695, 751.

67. Despite the synchronized testimony of Messrs. Rey and Conant concerning the supposed financing commitment, that testimony was at odds with previous sworn statements made by both men concerning the supposed commitment. The evidence thus raises serious questions about the accuracy of the claimed existence of the Conant commitment.

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<sup>21/</sup> With respect to the 10 percent share of the sales price, Mr. Conant testified that that would be presented to him either as a payment of cash representing 10 percent of the sale price, or a continuing 10 percent equity interest in the station. Tr. 694.

(i) The Date of the Conant Commitment

68. As noted, both Mr. Rey and Mr. Conant testified in June, 1996, that the financing commitment was agreed to in 1984 (or possibly, according to Mr. Conant, in 1985). Tr. 749; 655. That testimony was inconsistent with previous sworn statements of both witnesses.

69. In January, 1991 in the Miami Tower Litigation, Mr. Rey testified that he had a loan commitment from Mr. Conant. Press Exh. 10. There Mr. Rey was asked to provide "the date of that financial commitment from Mr. Conant". Id. at p. 15. Mr. Rey's response was:

Rey: I have had ongoing conversations with Mr. Conant for a number of years. I don't know if I can give you an exact date.

Q: Did he tell you that he would give you \$4,000,000?

Rey: This has been an ongoing conversation. I said obviously when the litigation ended with the Supreme Court, but pick your date in the last few months.

Q: Any time within the last few months would be fairly accurate?

Rey: Well, since June of 1990.

Press Exh. 10, p. 16.

70. Thus, in 1991, given full opportunity to state the date of Mr. Conant's financial commitment, Mr. Rey said nothing at all about 1984. Rather, he testified that that commitment had been made sometime in the second half of 1990. Id. This is inconsistent with his testimony in this case in June, 1996.

71. During his testimony in the instant hearing, Mr. Rey was shown the transcript of his testimony in the Miami Tower



Litigation and asked to confirm that he had in fact testified that the date of the agreement was sometime after June, 1990. Mr. Rey did acknowledge his earlier testimony, but then attempted to explain the inconsistency by saying that "[m]y reference [during the Miami Tower Litigation] was reducing it to writing". Tr. 789. However, there is nothing in the transcript of the Miami Tower Litigation which supports that convenient explanation: the question presented to Mr. Rey in Miami sought "the date of th[e] financial commitment from Mr. Conant", without regard to whether it was written or oral, and Mr. Rey's answer similarly contained no limiting language whatsoever. Press Exh. 10, pp. 15-16.

72. The same type of inconsistency appears with respect to Mr. Conant. Mr. Conant was not called to testify in the Miami Tower Litigation.<sup>22/</sup> Mr. Conant was deposed in this case in May, 1996. During his deposition, he was asked the date of his agreement with RBC. He answered:

Conant: In the mid-eighties some time; maybe mid- to somewhere in the second half, between -- I don't remember exactly. Somewhere between 1985 and 1988 or '89, something like that.

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<sup>22/</sup> Despite the fact that RBC's financial arrangements have been the subject of litigation continuously since November, 1990, Mr. Conant's first public statement concerning his supposed commitment appeared in a Declaration ("Conant Declaration"), executed under penalty of perjury in February, 1996. The Conant Declaration was submitted to the Presiding Judge in April, 1996 by RBC in support of a Motion for Partial Summary Decision relative to the financial misrepresentation issue. In the Conant Declaration, Mr. Conant described the terms of his supposed agreement with RBC, but failed to include any date for that agreement. Rainbow Exh. 4.

Q: So would it be '85 through '89?

Conant: Approximately.

Tr. 657. During his testimony at the hearing, Mr. Conant confirmed that he had so testified in deposition, and he stated that he was not changing that testimony. Id.

73. Thus, the evidence indicates that, while Messrs. Rey and Conant now both claim that their agreement was reached in 1984 (or possibly 1985), their own previous sworn statements are not consistent with each other or with their current testimony.

(ii) The Terms of the Conant Commitment

74. As noted above, RBC is now advancing the notion that the Conant commitment was a detailed (albeit oral) understanding between Messrs. Rey and Conant which was reached long ago. The evidence indicates that Messrs. Rey and Conant had a meeting sometime in December, 1990, during which they discussed the status of RBC's situation. Tr. 789-791. It is reasonable to assume, therefore, that because the two had just conferred, the terms of any agreement between the two would have been relatively clear in their minds in January, 1991. On January 11, 1991, within a month of their December, 1990 meeting, Mr. Rey testified as follows in the Miami Tower Litigation with respect to his understanding of the Conant agreement:

Q: Is there any security that you have given [to Mr. Conant] or collateral for this loan?

Rey: Yes. A minority participation on the station.

\* \* \*

Q: Mr. Conant is a minority member?

Rey: No. By that I mean --

Q: Or do you mean a minority shareholder?

Rey: Shareholder, yes. That's what I mean.

\* \* \*

Q: You are using "minority" now in a different sense, that he wants to be a minority shareholder of your partnership?

Rey: Correct.

Press Exh. 10, pp. 13-14.

75. Thus, within a month after meeting with Mr. Conant in December, 1990, Mr. Rey's description of the terms of the supposed Conant commitment was completely different from RBC's current take. Mr. Rey said nothing in Miami about the fact that Mr. Conant would receive (in addition to repayment of his loan with interest) 50 percent of the station's net cash flow for five years, or 25 percent of its net cash flow thereafter, or a security interest in all equipment junior only to security interests held by equipment suppliers, or a 10 percent share of the sale price of the station, or personal guarantees of Mr. Rey and Ms. Jaramillo. And the only term of the supposed commitment he did mention in January, 1991 in the Miami Tower Litigation -- "a minority participation in the station" (later clarified as a shareholding or ownership position) -- is nowhere to be seen in RBC's current version of the commitment.

76. When asked, in the instant hearing, whether his January, 1991 testimony in the Miami Tower Litigation was

accurate, Mr. Rey did not answer yes or no. Instead, he merely recited the terms which RBC now claims governed the loan, closing his response by saying "That's what I meant by it." Tr. 792. When asked why he had failed, in January, 1991, to mention the fact that he himself was supposedly obligated to provide a personal guarantee, he acknowledged that such guarantees were collateral; he then responded that he did not know why he had not mentioned the guarantees, that he could not answer that question. Tr. 793.

77. Thus, while RBC would have the Commission believe now, in 1996, that an elaborate and detailed loan agreement had been in place since 1984, the available, more contemporaneous evidence (as distinct from the self-serving latterday testimony of RBC's witnesses, Messrs. Rey and Conant) indicates that any understandings which Messrs. Rey and Conant may have reached as of January, 1991 were substantially different from those which RBC now says were in place then.

(iii) The Basis for the Conant Commitment

78. Questions also exist with respect to the asserted basis for Mr. Conant's supposed willingness to provide a loan commitment to RBC.

79. In the Conant Declaration, executed in February, 1996, Mr. Conant, apparently explaining the basis for his willingness to extend a \$4 million oral loan commitment to RBC, stated that

I had already become well acquainted with [Mr. Rey's] abilities during the time that he had worked for Storer Broadcasting Company and made occasional trips to

Chicago.

Rainbow Exh. 4, p. 1 (emphasis added). But when cross-examined about this statement, Mr. Conant testified that he had never transacted any business with Mr. Rey when Mr. Rey worked for Storer Broadcasting, and that during that period their acquaintance amounted only to a couple of visits. Tr. 665. According to Mr. Conant, the basis for his claim that he "had already become well acquainted with [Mr. Rey's] abilities" at that time was

Conant: I had gotten to know [Mr. Rey] and I felt he was a very competent person, and that he would have been equally competent while he was working for Storer Broadcasting. And I also knew him somewhat when he was working for Storer.

Tr. 666. Thus, Mr. Conant's assessment of Mr. Rey's abilities while at Storer Broadcasting was nothing more than pure speculation ("I felt . . . he would have been equally competent"), and his claim of being "well acquainted" with Mr. Rey when Mr. Rey worked for Storer Broadcasting was far less than candid in view of the actual extent of his familiarity ("I knew him somewhat when he was working for Storer").

80. In the first paragraph of the Conant Declaration, Mr. Conant also referred to "my past financial relationship with [RBC] principals". Rainbow Exh. 4, p. 1. But on cross-examination, he admitted that he had never had any financial relationship with either RBC principal. Tr. 668-69.

81. Similarly, in the Conant Declaration, Mr. Conant explained that he had not insisted that his financing commitment

to RBC be reduced to writing because his

past business experiences and relationships with Joseph Rey and Leticia Jaramillo were so satisfactory.

Rainbow Exh. 4, p. 2. But when asked during cross-examination what "business experience" he had had with Ms. Jaramillo, he answered "none". Tr. 659. And the only "business experience" he had had with Mr. Rey involved a less-than-two-year period (from approximately August, 1982 to June, 1984, Tr. 746-47) during which Mr. Rey was an employee of a Miami television station. Mr. Conant was a limited partner in the licensee of that station, but he testified that, in that capacity, he exercised no executive duties at all and he did not supervise Mr. Rey. Tr. 663-64.

82. Mr. Conant also testified that he had never seen any financial statements for either Mr. Rey or Ms. Jaramillo <sup>23/</sup>, and that he had no idea of what either's net worth might be, although Mr. Conant was aware of the fact that Mr. Rey "probably didn't have enough money" to finance construction himself. Tr. 654; see also Tr. 659, 664. <sup>24/</sup> According to Mr. Conant,

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<sup>23/</sup> Indeed, despite the fact that the supposed financing agreement included, as a requirement, the personal guarantee of Ms. Jaramillo, Mr. Conant testified that he himself never spoke with Ms. Jaramillo about the agreement or about her personal guarantee. Tr. 659, 678.

<sup>24/</sup> For his part, Mr. Rey had seen only some materials relating to Mr. Conant's net worth which had been submitted to the Commission in approximately 1979 and some additional documents which were apparently available for Mr. Rey's inspection in 1982. Tr. 784. Other than those materials -- access to which was terminated in 1984, Tr. 784-85 -- Mr. Rey had reviewed no other information about Mr. Conant's financial situation. Id. While  
(continued...)

his purpose in requiring personal guarantees for his supposed \$4 million loan commitment was to obtain a demonstration of the "sincerity" of Mr. Rey and Ms. Jaramillo. Tr. 654.

83. In closing the Conant Declaration, Mr. Conant stated that

I reiterate my past and present [sic] confidence in the [RBC] principals, and further state that my confidence was premised upon year's [sic] of satisfactory work together.

Id. On cross-examination, Mr. Conant was asked what "satisfactory work" he was referring to in this statement. He responded, "the performance at WDZL". Tr. 667. He then acknowledged that any "performance" at all involving Station WDZL(TV) would have occurred only between sometime in 1982 and sometime in 1984. Id. And, despite the fact that the statement in the Conant Declaration refers unequivocally to the RBC "principals", he also acknowledged that it only included Ms. Jaramillo "in a more limited sense because I did not know her as well. I knew her only somewhat socially." Tr. 668. When asked whether Ms. Jaramillo had worked at Station WDZL(TV), Mr. Conant responded:

I think she did do some work there, although I couldn't -- wouldn't swear to that. I think so. I think she did -- wasn't a key employee. I think she participated to some extent.

Id.

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<sup>24/</sup> (...continued)

the record contains Mr. Rey's very general statements concerning his understanding of Mr. Conant's net worth as of 1982 or earlier (Tr. 748-49), the record contains no information at all establishing what Mr. Conant's net worth might have been after that date, including January, 1991.

(iv) Summary Concerning Existence of the Conant Loan Commitment

84. The evidence does not support a finding that Mr. Conant ever provided RBC with any commitment to provide financing for RBC's construction and operation. The only evidence offered by RBC with respect to the existence of such a commitment was the testimony of Messrs. Rey and Conant. But, as demonstrated above, that testimony conflicted in numerous material respects with previous statements of both witnesses. These conflicts raise substantial questions about the credibility of the testimony of both witnesses and the validity of their claims concerning the existence of a loan commitment from Mr. Conant.

85. These credibility questions do not involve mere nits which might be found in anyone's testimony -- apparent lapses of memory, inadvertent misstatements and the like. Rather, the inconsistencies involve important aspects of the supposed transaction, aspects which both Mr. Rey and Mr. Conant knew to be a focus of attention. For example, the Conant Declaration was prepared for submission to the Commission in this very case, and was plainly designed to convince the Presiding Judge that Mr. Conant had longstanding business relationships with both Mr. Rey and Ms. Jaramillo which might explain his supposed willingness to lend RBC \$4 million. But upon cross-examination it became apparent that those claims were far from true. See Paragraphs 78-83, supra.

86. Similarly, for another example, Mr. Rey now would have the Presiding Judge believe that an elaborate, detailed, multi-



provision loan agreement was in place since 1984. But in 1991, shortly after conferring with Mr. Conant, Mr. Rey did not even mention the personal guarantee which he was supposed to provide for the \$4 million commitment -- much less any of the other terms which Mr. Rey now claims to have been in place; and the one term he did mention in Miami is noticeably absent from Mr. Rey's current version of the agreement. See Paragraphs 74-77, supra. It is incredible that, if such a guarantee requirement (or such other terms) had in fact been in place at that time, Mr. Rey might have simply forgotten about it/them.

87. One additional consideration undermines the notion that RBC was relying at all times on a definite, detailed loan commitment from Mr. Conant. In his June, 1991 decision in the Miami Tower Litigation denying RBC's request for injunctive relief, Judge Marcus found, as a factual matter, that Rainbow had yet to obtain financing. Rey v. Guy Gannett Publishing Co., 766 F. Supp. at 1145. If RBC did in fact have a loan commitment from Mr. Conant in place in 1991, RBC would normally have been expected to seek to have Judge Marcus' contrary finding reconsidered or reversed. There is absolutely no evidence that RBC took any steps to do so. <sup>25/</sup>

88. Under these circumstances, it cannot be found that the testimony of Messrs. Rey and Conant relative to the existence of an oral loan commitment was credible. Therefore, it cannot be

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<sup>25/</sup> When asked whether RBC ever sought reconsideration or other review of that finding, Mr. Rey answered, "I don't recall. I don't know." Tr. 940.